PUBLIC PROSECUTOR

v.

NARONCNE SOOKPAVIT & ORS.

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[CRIMINAL APPLICATION NO. 1 OF 1984]
31 JANUARY 1985

CIVIL PROCEDURE: *Appeal filed within statutory period - At wrong registry -Application for an order to extend time to file petition of appeal - Effect.*

The notice of motion is an application under s. 310 of the Criminal Procedure Code from the Public Prosecutor for an order to extend the time to file a Petition of Appeal and for two incidental orders to further detain certain exhibits and to dispense with service of the Notice on the respondents.

The 23 respondents are Thai nationals who on 10 September 1984 were acquitted and discharged in the Magistrate's Court upon a charge that they were found to be in possession of fishing appliances within Malaysian territorial waters without a valid licence contravening reg. 3(b) of the Fisheries (Maritime) Regulations 1967, punishable under s. 11(1) of the Fisheries Act 1963. In acquitting the respondents the Magistrate made an order releasing the fishing equipment including a fishing vessel.

The Public Prosecutor filed a Notice of Appeal within the statutory period of 10 days under s. 307(i) of the Criminal Procedure Code. The Petition of Appeal was filed within the statutory period of 10 days as stipulated by s. 307(iv) but the office boy filed it at the Registry of the Subordinate Courts at Johore Bahru instead of the Registry at Kota Tinggi.

The Deputy Public Prosecutor conceded that an appeal is deemed to have been withdrawn under s. 307(ix) but contended that the High Court has power under s. 310 to extend the time to enable the Petition of Appeal to be lodged in the correct registry.

Held:

The time for lodging of the Petition of Appeal against the order should be extended in this case in order that substantial justice may be done in the matter especially having regard to the ground in the Deputy Public Prosecutor's original Petition of Appeal that the Magistrate had "misdirected himself in releasing the exhibits in that he failed to apply his mind to the provision(s) of s. 14(1)(a)(ii), s. 14(1)(b) and s. 14(2) of the Fisheries Act 1963 (Revised 1978)."

[Order for detention of fishing equipment and vessel pending disposal of appeal.]

Cases referred to:

Veerasingam v. Public Prosecutor [1958] 24 MLJ 76
Public Prosecutor v. Tan Teng Gak [1962] 28 MLJ 398
Rex v. Moona Mohamed Hussain Maricar [1935] MLJ 29
Chew Poh Choo v. Chua Kwong Pow [1948] MLJ 177
Chong Kueng Ying & Ors. v. Lovis Lavagna [1972] 1 MLJ 180
Ahmad bin Yahaya & Anor. v. Ahmad bin Sulaiman [1972] 2 MLJ 109
A. Dickinson v. Public Prosecutor [1955] 21 MLJ 191

Legislation referred to:

Criminal Procedure Code, ss. 307(i), (ix), (iv), 310
Fisheries Act 1963, ss. 11(1), 14(1)(a)(ii), (1)(b)
Fisheries (Maritime) Regulations 1967, Reg. 3(b)

For the applicant - Yacob bin Atan; DPP
For the 1st & 2nd respondents - Abbas Ismail Rowland; M/s. Abbas Ismail Rowland & Co.

JUDGMENT

LC Vohrah J:

This Notice of Motion is essentially an application under s. 310 of the Criminal Procedure Code (FMS Cap. 6) on the part of the Public Prosecutor for an order to extend the time to file a Petition of Appeal and for two incidental orders to further detain certain exhibits and to dispense with service of the Notice on the respondents.

All the twenty-three respondents are Thai nationals who were on 10 September 1984 acquitted and discharged in the Magistrate's Court at Pengerang in Johore upon a charge that they were jointly on 27 January 1984 at about 4.30 p.m. found to be in possession of fishing appliances within Malaysian territorial waters without a valid licence thereby committing an offence under reg. 3(b) of the Fisheries (Maritime) Regulations 1967 punishable under s. 11(1) of the Fisheries Act 1963 (Revised 1978). In acquitting and discharging the accused the Magistrate made an order for the release of the fishing equipment exhibited in Court including a fishing vessel bearing registration number SC 2219. The Deputy Public Prosecutor being dissatisfied with this order of release filed a Notice of Appeal within the statutory period of 10 days under subsection (i) of s. 307 of the Criminal Procedure Code at the registry of the Subordinate Courts at Kota Tinggi which has always served as the registry of the Pengerang Magistrate's Court as this Court is a closed Court. On 1 December 1984 the Deputy Public Prosecutor was given the grounds of decision of the acquitting Magistrate and on 6 December 1984 the Petition of Appeal in respect of this case was by mistake of the office - boy of the Deputy Public Prosecutor's office lodged at the registry of the Subordinate Courts at Johore Bahru instead of the registry at Kota Tinggi but well within the statutory period of 10 days stipulated by subsection (iv). These are the relevant facts.

The Deputy Public Prosecutor whilst conceding that the appeal is deemed to have been withdrawn under subsection (ix) of s. 307 of the Code contends that the High Court has power under s. 310 to extend the time to enable the Petition of Appeal to be lodged in the correct registry. Section 310 reads:

> A Judge may, on the application of any person desirous of appealing who may be debarred from so doing upon the ground of his not having observed some formality or some requirement of this Code, permit an appeal upon such terms and with such directions to the Magistrate and to the parties as such Judge shall consider desirable, in order that substantial justice may be done in the matter.

The principles to be applied in considering an application under s. 310 have been clearly enunciated by Thomson CJ (as he then was) in *Veerasingam v. Public Prosecutor* [1958] 24 MLJ 76 at p. 79 as follows:

> The only fetter which s. 310 places upon the exercise of the discretion which it gives to the Judge is that it shall be exercised "in order that substantial justice may be done." Clearly, to exercise his discretion properly the Judge must apply his mind to all the relevant material. He must consider the circumstances of the original trial. He must consider the original Petition of Appeal. And he must consider the circumstances which are now urged upon him to induce him to allow any departure from or addition to that original Petition of Appeal. He must consider his own powers as to such matters as the granting of adjournment and the requiring of Notice to be given. And then he must exercise his discretion as he sees fit in order that substantial justice may be done in the matter. It may be that he may find it helpful to look

at what has been done in some other case by some other Judge but if he does he must be careful to look at what that other Judge has done merely as an illustration and not as laying down any judicial precedent.

The first and second respondents are represented by counsel and, in my view, his only substantive argument against the Court exercising its discretion in favour of the applicant is that the grounds put forth by the applicant are not such as the Court ought to rely upon to grant the extension in order that substantial justice may be done in the matter because the negligence of a member of the Deputy Public Prosecutor's subordinate staff in not lodging the Petition of Appeal in the appropriate registry has no merit in view of the authorities he cited, namely *Public Prosecutor v. Tan Teng Gak* [1962] 28 MLJ 398, *Rex v. Moona Mohamed Hussain Maricar* [1953] MLJ 29, *Chew Poh Choo v. Chua Kwong Pow* [1948] MLJ 177, *Chong Kueng Ying & Ors. v. Lovis Lavagna* [1972] 1 MLJ 180, *Ahmad bin Yahaya & Anor. v. Ahmad bin Sulaiman* [1972] 2 MLJ 109 and *A. Dickinson v. Public Prosecutor* [1955] 21 MLJ 191. I have considered all these authorities and find that the authority which is of direct relevance to the present case is that of *Chong Kueng Ying & Ors. v. Lovis Lavagna* where Suffian FJ (as he then was) held that the mistake of a legal adviser was not a sufficient ground for granting special leave to appeal out of time where he had failed to serve a properly filed Notice of Appeal upon the respondent within time because he had erroneously thought that it was not for him but for the Court to do so. That case however concerned an application relating to statutory rules in civil proceedings for which different considerations must apply. I do not, with great respect, feel bound by the decisions in *Public Prosecutor v. Tan Teng Gak, Rex v. Moona Mohamed Hussain Maricar* and *A. Dickinson v. Public Prosecutor* all three of which must, in my view, be considered in the wake of the decision of the Court of Appeal in *Veerasingam's case* which actually deals specifically with the Court's discretion under s. 310 of the Criminal Procedure Code with which the present application is directly concerned.

In the light of the principles enunciated in *Veerasingam's case* (*supra*), the Court is required to consider all the relevant material when exercising its discretion in order that substantial justice may be done. I have considered all the averments that have been made in the supporting affidavits of the Deputy Public Prosecutor, his legal assistant and his office-boy (See encl. 2, 3, 4 and 6) and I have also considered all the averments of counsel in his opposing affidavit (See encl. 9) and I am of the opinion that the time for the lodging of the Petition of Appeal against the order for the release of the objects exhibited at the trial should be extended in this case in order that substantial justice may be done in the matter especially having regard to the ground in the Deputy Public Prosecutor's original Petition of Appeal that the Magistrate had "misdirected himself in releasing the exhibits in that he failed to apply his mind to the provision(s) of s. 14(1)(a)(ii) and s. 14(1)(b) and s. 14(2) of the Fisheries Act 1963 (Revised 1978)" (See 'CPJ1'exhibited to encl. 4). The Deputy Public Prosecutor, in my view, did all that could be expected of him when he completed the Petition of Appeal within time and instructed his legal assistant to file it. There has in fact been no delay in the filing of the Petition. It was merely a case of not filing in the appropriate registry obviously through inadvertence or ignorance of the office-boy but it was a matter of misfiling clearly within the jurisdiction. As the appeal is against the release of the exhibits concerned it is, I think, appropriate that an order should at the same time be made for their detention pending the disposal of the appeal. It is also clear from the letter marked 'YBA' exhibited to the Deputy Public Prosecutor's affidavit (see encl. 6) that counsel's firm is acting as solicitors for all the respondents and as the same counsel is representing the first and second respondents in this application I do not think any injustice would be done to the remaining respondents if

I made an order for the service of this Notice of Motion to be dispensed with in regard to them especially as they have all been repatriated to Thailand. In the result I hereby grant the application in terms of prayers (a) and (b) and also in terms of prayer (c) in respect of the respondents not represented by Counsel in this application.

Also found at [1985] 1 CLJ 371